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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 598

W. D. GREENSHIELDS, JULIUS LIVINGSTON, and LIVINGSTON OIL COMPANY, a corporation,
Petitioners,

VERSUS

WARREN PETROLEUM CORPORATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

W. D. GREENSHIELDS,
TED R. FISHER,
DUKE DUVALL,
Attorneys for Petitioners.

November, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 3-8780

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In the
Supreme Court of the United States
OCTOBER TERM, 1957

No. .....

W. D. GREENSHIELDS, JULIUS LIVINGSTON, and LIVINGSTON OIL COMPANY, a corporation,
Petitioners,
VERSUS
WARREN PETROLEUM CORPORATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

W. D. Greenshields, Julius Livingston and Livingston Oil Company, a corporation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit in the above styled action.

OPINION BELOW

There was no opinion by the United States District Court for the Western District of Oklahoma, the trial court. The judgment and opinion of the United States Court of Appeals is not officially reported, but the portion of the opinion dealing with the question of jurisdiction is printed in the appendix hereto; and the entire opinion at pages 3 to

26 of the certified transcript of the record of the proceedings before the Court of Appeals.

JURISDICTION

Petitioners seek review of the opinion and judgment of the United States Court of Appeals for the Tenth Circuit, entered September 3, 1957. The order of the Court of Appeals denying petitioners' petition for rehearing was dated and filed September 27, 1957. On October 8, 1957, the Court entered an order staying the mandate for thirty days for purposes of petitioners' petition for writ of certiorari.

Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1). The grounds on which the jurisdiction of this Court is invoked are as follows:

(1) The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. *American Fire & Casualty Company* v. *Finn*, 341 U.S. 6, 71 Sup. Ct. 534, 95 L. Ed. 702.

(2) The Court of Appeals has decided an important state question in a way in conflict with applicable state law. *Blasdel* v. *Gower*, 70 Okla. 178, 173 Pac. 644; *Democrat Printing Company* v. *Johnson*, 71 Okla. 128, 175 Pac. 737; *Vose* v. *United States Cities Corporation*, 152 Okla. 295, 7 P.2d 132; *Powell* v. *Spence*, 169 Okla. 63, 35 P.2d 925; *Johnson* v. *Noble*, 10th Cir., 64 F.2d 396; *Houser* v. *Kurn*, 10th Cir., 100 F.2d 488; *Willoughby* v. *Sinclair Oil & Gas Company*, 10th Cir., 188 F.2d 902.

(3) The Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the

same matter. *Mayflower Industries* v. *Thor Corporation*, 3rd Cir., 184 F.2d 584, *certiorari denied Thor Corporation* v. *Mayflower Industries*, 341 U.S. 903, 71 Sup. Ct. 610, 95 L. Ed. 1342; *Edwards* v. *E. I. DuPont De Nemours & Company*, 5th Cir., 183 F.2d 165; *Bentley* v. *Halliburton Oil Well Cementing Company*, 5th Cir., 174 F.2d 788.

QUESTIONS PRESENTED

The judgment below is void for want of federal court jurisdiction because this case was improperly removed under 28 U. S. C., Section 1441(c), and the holding in *American Fire & Casualty Company* v. *Finn*, 141 U.S. 6, 71 Sup. Ct. 534, 95 L. Ed. 702, since there was no separate and independent claim or cause of action of plaintiffs against any of the defendants in that:

(a) This is an action for damages, arising from a continuing civil conspiracy, sought to be recovered from all defendants as joint tort feasors, and

(b) Judgment rendered against and satisfied by any one or more of the defendant tort feasors herein would bar recovery by plaintiff on his claim against all the other defendants, and

(c) The fact that some of the nonresident defendants joined the continuing conspiracy after its origin and in a different degree is immaterial.

STATEMENT OF THE CASE

W. D. Greenshields, plaintiff below, as owner of certain oil and gas royalty interests, brought this action in the State District Court of Major County, Oklahoma, against

certain oil and gas lessees and gas purchasers, including petitioner Livingston, on the ground that the defendants had engaged in a civil conspiracy to deprive him of his contractual property rights.

Greenshields is a resident of Oklahoma. Several of the lessee defendants are residents of Oklahoma. The nonresident lessees and gas purchasers filed petitions to remove the case to the United States District Court for the Western District of Oklahoma on the sole ground that Greenshields' state court petition had stated a separate and independent claim within the meaning of 28 U. S. C., Section 1441(c) against certain of the nonresident lessees. The motion of Greenshields to remand the case to the state court and petitioners' challenge to the federal court's jurisdiction were overruled.

Petitioner Livingston cross-claimed against the gas purchasers, adopting the gravamen of Greenshields' complaint and cause of action. The trial of the case to the court upon the merits of Greenshields' action against the defendants, and Livingston's cross-claim against the gas purchasers, resulted in a judgment against Greenshields and Livingston, from which they prosecuted their respective appeals to the Court of Appeals for the Tenth Circuit, attacking the trial court's holding upon both the jurisdictional question and upon the merits.

The Court of Appeals affirmed the trial court's finding upon the jurisdictional question on the sole basis that Greenshields' state court petition had stated a "separate and independent claim" within the meaning of 28 U. S. C., Section 1441(c), against two of the defendants, Great Western

Drilling Company and Great Western Producers, Inc., but only these two, though all the defendants were alleged to be conspirators jointly.[1] The portions of the state court petition applicable to the question of federal jurisdiction were narrated in the opinion of the Court of Appeals (Page 8, Court of Appeals Record) and are as follows:

> "In the first paragraph of paragraph 9 of the complaint the pleader has narrated the results of the so-called conspiracy and concludes by stating, 'All because of the unconscionable, confiscatory and unreasonable "Gas Purchase Contracts" entered by the "defendant lessees" and "Plant Operators" all as will be hereinafter more particularly set out.' Then in paragraph 11 it is alleged 'That in late 1950 or early 1951 Warren Petroleum Corporation and Oklahoma Natural Gas Company, corporations, defendants herein' entered "Gas Purchase Contracts" with all the different "lessee defendants" in the Ringwood Field, with the exception of two who will be hereinafter mentioned.' Later in paragraph 11 the pleader alleges that the 'Gas Purchase Contracts' were executed and entered by all the 'Lessee Defendants' except by the defendants Great Western Producers, Inc. and Great Western Drilling Company, a corporation, who have since entered the contract, however, with certain modifications as to producing zones committed under the same. That with this one exception all the lessees entered exact contracts and thus committed the sale of all their gas in the Ringwood Field. Still later in paragraph 17, it is alleged 'That the "Gas Contracts" as have been entered by the defendant lessees are unconscionable, confiscatory, unreasonable and are an attempt to alienate val-

[1] This was solely on the basis that these two defendants were not in on the original conspiracy but joined it later and to a different degree.

uable property rights from this plaintiff * * *. That the contract was a connivance, collusion, and confederation between the plant operators, Warren Petroleum Corporation and Oklahoma Natural Gas Company and all the lessee defendants" who signed the agreement * * *."[2]

Greenshields alleges in paragraph 24 of the petition that he incurred damages from the first part of 1952 to the time of the filing of this action. In paragraph 27, he alleges that the defendants are jointly and severally liable for those damages. In paragraph 30, he alleges that further sums will accrue.

REASONS FOR GRANTING THE WRIT

Point I.

The Opinion of the Court of Appeals is contrary to the holding of this Court in *American Fire & Casualty Company* v. *Finn*, 341 U.S. 6, 71 Sup. Ct. 534, 95 L. Ed. 702, and of the construction therein placed upon 28 U.S.C., Section 1441(c).

Point II.

The Court of Appeals' Opinion is contrary to decisions of other circuits involving the same question. *Mayflower Industries* v. *Thor Corporation*, 3rd Cir., 184 F.2d 584, *certiorari denied Thor Corporation* v.

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[2] The Court of Appeals underscored the portions of the petition reading: "with the exception of two who will be hereinafter mentioned", and the portion stating that the Great Western interests contracted "with certain modifications as to producing zones committed under the same." Petitioners submit that the emphasis should properly have been placed on the portion stating that the Great Western interests "have since entered the contract" and that the conspiracy included "all the lessee defendants who signed the agreement."

Mayflower Industries, 341 U.S. 903, 71 Sup. Ct. 610, 95 L. Ed. 1342; *Edwards* v. *E. I. DuPont De Nemours & Company*, 5th Cir., 133 F.2d 165; *Bentley* v. *Halliburton Oil Well Cementing Company*, 5th Cir., 174 F.2d 788.

Point III.

The Opinion of the Court of Appeals is contrary to decisions of the Supreme Court of Oklahoma on questions of Oklahoma law which are of controlling importance in this determination of federal court jurisdiction. *Blasdel* v. *Gower*, 70 Okla. 178, 173 Pac. 644; *Democrat Printing Company* v. *Johnson*, 71 Okla. 128, 175 Pac. 737; *Vose* v. *United States Cities Corporation*, 152 Okla. 295, 7 P.2d 132; *Powell* v. *Spence*, 169 Okla. 63, 35 P.2d 925; *Johnson* v. *Noble*, 10th Cir., 64 F.2d 396; *Houser* v. *Kurn*, 10th Cir., 100 F.2d 488; *Willoughby* v. *Sinclair Oil & Gas Company*, 10th Cir., 188 F.2d 902.

Point I.

The Opinion of the Court of Appeals is contrary to the holding of this Court in American Fire & Casualty Company v. Finn, 341 U.S. 6, 71 Sup. Ct. 534, 95 L. Ed. 702, and of the construction therein placed upon 28 U.S.C., Section 1441(c).

Greenshields' state court petition alleged a single wrong; to-wit, a conspiracy by all of the defendants to deprive him of his oil and gas royalty interests. The fact that this wrong was to be accomplished by a series of transactions does not give rise to a separate and independent claim or cause of action, within the meaning of 28 U.S.C., Section 1441(c). In holding that Greenshields' cause of action against Great Western was separate and independent because Great Western joined the conspiracy at a later time

and to a different degree, the opinion of the Court of Appeals is in direct conflict with the holding of this Court in *American Fire & Casualty Company* v. *Finn, supra.*

In the *Finn* case, this Court held that where a plaintiff suffers one actionable wrong as a result of the combination of several distinct acts arising from an interlocked series of transactions, that there is no separate and independent claim or cause of action under the statute against any one of the defendants. Since the liability of the defendant tort feasors is joint and several, it was further held that it was not necessary that the acts causing injury take place at the same time or that any one defendant affirmatively participate in all of the acts.

In fact, the holding of the *Finn* case goes a great deal further than it is necessary here. The defendant insurors were alleged to be liable in the alternative on the basis of two separate insurance contracts, and the individual local defendant in tort. Rather than alleging liability as comparatively "disconnected" as liability in the alternative, Greenshields has specifically alleged the joint liability of all defendants signing the gas purchase contracts pursuant to a conspiracy. It is undisputed that Great Western signed the contracts. Hence, a judgment and satisfaction against any one or more of the defendants would bar a subsequent recovery by Greenshields against the remaining defendants.

Even before the enactment of 28 U.S.C., Section 1441(c), this Court had held that allegations of joint and several tort liability did not state a separable controversy which would allow a nonresident defendant to remove the

case to the federal court. *Alabama Great Southern Railway Company* v. *Thompson*, 200 U.S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441. In the *Finn* case, this Court held that one purpose of the 1948 revision of the removal statute was to limit removal from state courts to a greater degree than had been the practice under the "separable controversy" statute.

Point II.

The Court of Appeals' Opinion is contrary to decisions of other Circuits involving the same question. Mayflower Industries v. Thor Corporation, 3rd Cir., 184 F.2d 584, certiorari denied Thor Corporation v. Mayflower Industries, 341 U.S. 903, 71 Sup. Ct. 610, 95 L. Ed. 1342; Edwards v. E. I. DuPont De Nemours & Company, 5th Cir., 183 F.2d 165; Bentley v. Halliburton Oil Well Cementing Company, 5th Cir., 174 F.2d 788.

We particularly call this Court's attention to the decision of the Court of Appeals for the Third Circuit in *Mayflower Industries* v. *Thor Corporation*, *supra*. In the *Thor* case, the plaintiff's state court petition was based on an alleged breach of a distributorship contract, and he further alleged that two of the defendants had entered into a new agreement *constituting a civil conspiracy*. Despite the fact that the plaintiff alleged liability on the part of one defendant resulting from breach of contract and liability on the part of two other defendants sounding in tort by virtue of a civil conspiracy, the Court of Appeals held as follows:

> "In the context of the present litigation it is enough to say that a consideration of the interests of the parties and the relationship of the two claims in subject matter and essential factual basis lead to the conclu-

sion that the claims of Mayflower against Thor and Teldisco do not constitute 'separate and independent' causes of action within the meaning of Section 1441 (c)."

In *Bentley* v. *Halliburton Oil Well Cementing Company*, *supra*, the Court of Appeals for the Fifth Circuit held that a petition alleging joint liability, or joint and several liability, does not state a separate and independent claim or cause of action against any of the defendant tort feasors under Section 1441(c) and that the action must be remanded to the state court. This was likewise the finding of the Fifth Circuit in *Edwards* v. *E. I. DuPont De Nemours & Company*, *supra*.

The Court of Appeals' decision here recognized that Greenshields had stated a claim in tort resulting from an alleged civil conspiracy. Its subsequent holding that the claim against defendant Great Western was separate and independent is in direct conflict with the decisions of other circuits discussed herein.

Point III.

The Opinion of the Court of Appeals is contrary to decisions of the Supreme Court of Oklahoma on questions of Oklahoma law which are of controlling importance in this determination of Federal Court jurisdiction. Blasdel v. Gower, 70 Okla. 178, 173 Pac. 644; Democrat Printing Company v. Johnson, 71 Okla. 128, 175 Pac. 737; Vose v. United States Cities Corporation, 152 Okla. 295, 7 P.2d 132; Powell v. Spence, 169 Okla. 63, 35 P.2d 925; Johnson v. Noble, 10th Cir., 64 F.2d 396; Houser v. Kurn, 10th Cir., 100 F.2d 488; Willoughby v. Sinclair Oil & Gas Company, 10th Cir., 188 F.2d 902.

Since the Court of Appeals' opinion recognizes that "the pleader has alleged claims in tort arising from civil conspiracy said to have been consummated by the lessee defendants and the plant operators", its opinion is in conflict with well-established principles of Oklahoma law as determined by the Supreme Court of Oklahoma and previously construed by the Tenth Circuit Court of Appeals.

The principal basis for holding that Great Western was not a conspirator was that they joined the common design at a later time rather than being an original party to the allegedly unlawful contracts. On page 6 of its opinion, the Court held:

> "Since the acts of the Great Western interests are alleged to have transpired at a different time than those of the other lessee defendants and are further asserted to have consummated in a different result, the pleader has negatived the participation of Great Western in the principal conspiracy of which he complains."

We call this Court's attention to the fact that the opinion recognizes that Great Western subsequently entered the contract. It even cited paragraph 17 of the state court petition alleging that the contract was a "connivance, collusion, and confederation" between the plant operators and all the lessee defendants who signed the agreement. The Great Western interests were among the lessees so signing.

The other basis for the decision was that the acts of participation of Great Western were ones "occasioning different results." Actually, the only difference in result was that the Great Western contracts covered less extensive producing zones. Greenshields alleged that these contracts were part of the common scheme of conspiracy directed at him.

The opinion is in fundamental conflict with the well-established rule of Oklahoma law that where a conspiracy is alleged to have existed, each of the conspirators participating therein is jointly and severally liable for the acts of all other conspirators done in furtherance of the conspiracy. It is not necessary that the acts all take place at the same time or that each conspirator personally participates in all of the misconduct. The rule was stated by the Supreme Court of Oklahoma in *Blasdel* v. *Gower*, *supra*, and has been uniformly followed since that time. *Democrat Printing Company* v. *Johnson*, *supra*.

Nor is it necessary that the conspirator derive the same measure of benefit from the acts and purposes of the conspiracy, or that he benefit at all from them. *Vose* v. *United States Cities Corporation*, *supra*; *Powell* v. *Spence*, *supra*. Before the enactment of 28 U.S.C., Section 1441(c), the Court of Appeals had held that, under Oklahoma law, a

petition alleging joint and several liability in tort against a number of defendants did not state a "separable controversy" and that the case was improperly removed. *Johnson* v. *Noble, supra; Houser* v. *Kurn, supra.*

Following the enactment of Section 1441(c), the Oklahoma law in this regard was again construed in *Willoughby* v. *Sinclair Oil & Gas Company, supra.* In citing Professor Moore's commentaries with approval, Judge Murrah stated therein:

> "Where the plaintiff joins two or more defendants to recover for damages for one injury and even though he charges them with joint and several liability or only several liability, or charges them with liability in the alternative, *there is no joinder of separate and independent causes of action within the meaning of Section 1441(c)*" (Emphasis supplied).

Oklahoma's position is succinctly epitomized in the following language:

> "Persons entering into the conspiracy after its formation are liable for all acts previously or subsequently done in pursuance thereof." —15 C.J.S., "Conspiracy", Section 19.

> "The connection between the parties having been established, whatever was done in pursuance of the conspiracy by one of the conspirators is considered as the act of all of the conspirators; all are equally liable therefor as joint tort feasors, regardless of whether they were original parties to the conspiracy and irrespective of either the fact that they did not actively participate therein or the extent to which they benefited thereby." —11 Am. Jur., "Conspiracy", Section 48.

It is natural that the majority of cases considering the question of removability of a tort action in conspiracy as a separate and independent claim would be reported from the federal district courts, since an order remanding a case to the state court from which it was removed is not reviewable on appeal [28 U.S.C., Section 1447(d)]. It is significant that, even before Section 1441(c) further limited removability, a continuing civil conspiracy was uniformly held to not state a separable controversy between the plaintiff and any of the defendant conspirators. The following decisions are merely representative in this regard: *Del Fungo Giera* v. *Rockland Light & Power Company* (D.C., N.Y.), 46 F.2d 552; *Bechman* v. *Seaboard Air Line Railroad Company* (D.C., S. Car.), 80 F. Supp. 976; *Good* v. *Hartford Accident & Indemnity Company* (D.C., S. Car.), 39 F. Supp. 475; *Lissauer* v. *Bertles* (D.C., N.Y.), 37 F. Supp. 881; *Hennock* v. *Silber* (D.C., N.Y.), 34 F. Supp. 894; others in 76 C.J.S., page 1039, footnote 66.

CONCLUSION

The petition for certiorari ought to be granted.

Respectfully submitted,

W. D. GREENSHIELDS,
TED R. FISHER,
DUKE DUVALL,
Attorneys for Petitioners.

November, 1957.

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
SEP 3 1957

Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

May Term, 1957

W. D. GREENSHIELDS, Appellant,	)	
vs.	)	No. 5449
WARREN PETROLEUM CORPORATION, a corporation; *et al.*, Appellees.	)	

* * * * *

JULIUS LIVINGSTON and LIVINGSTON OIL COMPANY, a corporation, Appellants,	)	
vs.	)	No. 5450
WARREN PETROLEUM CORPORATION, a corporation; *et al.*, Appellees.	)	

Appeals From the United States District Court
For The Western District of Oklahoma

W. D. Greenshields, Ponca City, Okla., for Appellant, W. D. Greenshields.

[APPENDIX]

Duke Duvall, Oklahoma City, Okla., and Ted Fisher, Tulsa, Okla., for Appellants, Julius Livingston and Livingston Oil Company.

Reford Bond, Jr., Chicasha, Okla., and Richard W. Fowler, Oklahoma City, Okla., for Appellee, Warren Petroleum Corporation; Warren M. Sparks, Tulsa, Okla., for Appellee, Oklahoma Natural Gas Company (John S. Carlson, O. L. Lupardus and T. Maxwell Anderson, all of Tulsa, Oklahoma, were with them on the brief).

Villard Martin, Garrett Logan and Villard Martin, Jr., all of Tulsa, Okla., for Appellee, The Atlantic Refining Company; Richard W. Fowler, Oklahoma City, Okla., Reford Bond, Jr., Chicasha, Okla., and Lynn J. Bullis, Jr., Oklahoma City, Okla., for Appellees, The Superior Oil Company, Mazda Oil Corporation, Bolsa Chica Oil Corporation and J. E. Trigg; Reford Bond, Jr. and Hatcher & Bond, Chicasha, Okla., for Appellee, Great Western Producers, Inc.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Appellant Greenshields, plaintiff below, is one of numerous owners of royalty rights in the Ringwood oil and gas field in Major County, Oklahoma. He initiated this action in the State Court of Major County as a purported class action "for himself and all others similarly situated", naming as defendants all those individuals and corporations holding leases from the royalty owners in the Ringwood Field; also named party defendants were the Warren Petroleum Corporation and Oklahoma Natural Gas Company, referred to as 'plant operators', who, though holding no lease rights in the field, had exclusive contractual rights with the lessee defendants for the purchase of gas produced in this field. Plaintiff had no direct contractual relation-

ship with the plant operators but did with some but not all of the named lessee defendants.

Greenshields is a resident of Oklahoma; the lessee defendants are residents of Oklahoma and numerous other states; the plant operators, Warren Petroleum and Oklahoma Natural Gas, are both corporations foreign to Oklahoma. Upon petition of the plant operators and some of the non-resident lessee defendants, including Great Western Drilling Co. and Great Western Producers, Inc., the cause was removed to the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C.A. 1441(c). That court refused remand and, by subsequent rulings, required plaintiff to amend his pleadings to eliminate all aspects of a class action and to dismiss as against all defendants other than the plant operators and those lessee defendants with whom Greenshields had contractual relations. Included in the latter group are the appellants Livingston and Livingston Oil Company who cross complained against the plant operators adopting the gravamen of plaintiff Greenshields' complaint and cause. The case as actually tried in the United States District Court was substantially an action for breach of contract by Greenshields against his lessees and the plant operators with a cross complaint against the latter upon the part of the lessees Livingston and Livingston Oil. Appellants join in asserting error in allowing removal from the state court and error in the determination of the merits.

It is apparent, in considering the jurisdictional question, that general diversity does not here exist and that valid removal from state to federal court is dependent upon the existence of a "separate and independent claim" which if sued upon alone would be removable. If such exists, apparent from the original pleading, the entire cause is subject to removal. 28 U.S.C.A. 1441(c); *American Fire and Cas. Co.* v. *Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702; *Pullman Co.* v. *Jenkins*, 305 U.S. 534, 59 S. Ct. 347, 83 L.

Ed. 334; *McLeod* v. *Cities Service Gas Co.* (10 Cir.) 233 F. 2d 242; *Preas* v. *Phebus* (10 Cir.) 195 F. 2d 61. It is of no significance that the pleader has a separate claim which he *could* assert and federal jurisdiction cannot be used as an implement to narrow or restrict the pleader's cause so that finally, when issue is joined, the cause has become one where federal jurisdiction is clear. Removability is dependent upon the course of pleading actually used by the pleader and not by what he could have asserted had he so chosen. Since Sec. 1441(c) was intended to restrict, not enlarge, removal rights all doubts arising from defective, ambiguous and inartful pleadings should be resolved in favor of the retention of state court jurisdiction. *Healy* v. *Ratta*, 292 U.S. 263, 54 S. Ct. 700, 78 L. Ed. 1248; *Aetna Ins. Co.* v. *Chicago, Rock Island & Pacific Rr. Co.* (10 Cir.) 229 F.2d 584. It is for the state court to determine the validity and essence of the complaint made if the pleader has asserted and claims but a single cause of action. *Alabama Great Southern Ry.* v. *Thompson*, 200 U.S. 206, 26 S. Ct. 161, 50 L. Ed. 441.

Applying these rules to the original complaint[1] filed in the state court we are in accord with appellant's contention that the pleader has alleged claims in tort arising from civil conspiracy said to have been consummated by the lessee defendants and the plant operators. But we are of the further view that the pleader has specifically negatived the participation of the Great Western Drilling Company and Great Western Producers, Inc. in the alleged conspiracy in the manner and time the pleader asserts it was

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[1] The complaint contains thirty-one lengthy paragraphs and covers thirty-four pages on the record transcript. To set it forth verbatim would be most burdensome to our decision. Counsel for appellants and appellees have attempted to summarize the allegations and in so doing have in effect begged the question for each such summary supports their respective conclusions, that is that the complaint sounds in tort or contract as their positions require. We set forth only those assertions of the pleader which we believe determinative of the issue.

conceived and consummated between the remaining lessee defendants and the plant operators.

In the first paragraph of paragraph 9 of the complaint the pleader has narrated the results of the so-called conspiracy and concludes by stating, "All because of the unconscionable, confiscatory and unreasonable 'Gas Purchase Contracts' entered by the 'defendant lessees' and 'Plant Operators' all as will be hereinafter more particularly set out." Then in paragraph 11 it is alleged "That in late 1950 or early 1951 Warren Petroleum Corporation and Oklahoma Natural Gas Company, corporations, defendants herein entered 'Gas Purchase Contracts' with all the different 'lessee defendants' in the Ringwood Field, *with the exception of two who will be hereinafter mentioned.*" Later in paragraph 11 the pleader alleges that the "Gas Purchase Contracts" were executed and entered by all the "Lessee Defendants" *except by the defendants Great Western Producers, Inc. and Great Western Drilling Company, a corporation, who have since entered the contract, however, with certain modifications as to producing zones committed under the same. That with this one exception* all the lessees entered exact contracts and thus committed the sale of all their gas in the Ringwood Field. Still later in paragraph 17 it is alleged "That the 'Gas Purchase Contracts' as have been entered by the defendant lessees are unconscionable, confiscatory, unreasonable and are an attempt to alienate valuable property rights from this plaintiff * * *. That the contract was a connivance, collusion, and confederation between the plant operators, Warren Petroleum Corporation and Oklahoma Natural Gas Company and all the 'lessee defendants' who signed the agreement * * *" (emphasis added).

Since the acts of the Great Western interests are alleged to have transpired at a different time than those of the other lessee defendants and are further asserted to have consummated in a different result, the pleader has

negatived the participation of Great Western in the principal conspiracy of which he complains. The contracts signed by Great Western cover a less extensive gas zone than those executed by any of the other defendants. The harm alleged to have been suffered by plaintiff and "all others similarly situated" by the execution of the gas purchase contracts cannot, by the original state court pleading, be attributable to Great Western. The claim made against Great Western by plaintiff arises from subsequent and different acts occasioning different results. It is a "separate and independent claim" within the bounds of Sec. 1441(c) and as such permits removal to federal jurisdiction. The trial court properly granted the petitions of Great Western Drilling Company and Great Western Producers, Inc for removal from the Oklahoma State Court.

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IN THE

Supreme Court of the United States.

OCTOBER TERM 1957.

No. 598.

W. D. GREENSHIELDS, JULIUS LIVINGSTON AND LIVINGSTON OIL COMPANY, A CORPORATION,
Petitioners,

v.

WARREN PETROLEUM CORPORATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

REPLY BRIEF OF RESPONDENTS.

Background.

The Ringwood Field in Major County, Oklahoma, was discovered in 1946 (Tr. Vol. I, p. 171). By January 1951 there were 175 wells in the field (Tr. Vol. I, p. 173). There was no market for gas produced with the oil; great quantities of gas were being vented to the air, and the Oklahoma Corporation Commission was considering shutting down the wells to prevent waste (Tr. Vol. I, pp. 172; 217; Vol. II, p. 281). The producers contacted a number of companies other than Respondents Warren and Oklahoma Natural relative to their construction of a gasoline plant to process

this waste gas but none were interested (Tr. Vol. II, pp. 281-2). Finally in 1951, Warren and Oklahoma Natural agreed to build a plant and entered into Gas Purchase Contracts with all producers in the field (Tr. Vol. I, p. 28; Vol. II, pp. 282-3; 399) except Respondents Great Western Producers, Inc., and Great Western Drilling Company. Two years later the Great Western companies executed gas contracts covering only one zone and a limited area (Tr. Vol. II, pp. 277-8; 402). In 1952 Warren and Oklahoma Natural commenced processing gas from the field utilizing a gathering system, compressors and gasoline plant which they had constructed or installed at a cost of $5.5 million (Tr. Vol. II, pp. 379; 385; 387). Such operations permitted the conservation of 45 billion cubic feet of gas that would otherwise have been wasted (Tr. Vol. II, pp. 357; 381; 385). The gas reserves will probably be exhausted before Warren and Oklahoma Natural's investment is paid out (Tr. Vol. I, p. 237).

Greenshields, one of the royalty owners in the Ringwood Field, brought this action in the District Court of Major County, Oklahoma attacking Warren and Oklahoma Natural's gas purchase contracts. He had previously failed in a proceeding before the Oklahoma Corporation Commission to have a minimum gas price of 10¢ per MCF established for the field (Tr. Vol. I, p. 85). After removal of the case to the United States District Court for the Western District of Oklahoma, Livingston crossclaimed against Warren and Oklahoma Natural attacking the gas contracts in his own right (Tr. Vol. I, p. 94). At the trial no effort was made to establish any conspiracy and the case was tried as a breach of contract suit. The District Court entered a judgment against Greenshields and Livingston which was affirmed by the Court of Appeals. By their Petition for Writ of Certiorari Petitioners challenge the jurisdiction of the United States District Court in the first instance.

Statement of the Case in Relation to Removability and Opinion of the Court of Appeals.

Greenshields' State Court Petition names as defendants a number of producers in the Ringwood Field in addition to Warren and Oklahoma Natural. Diversity of citizenship between Greenshields and all of the defendants does not exist. Therefore, removability is to be determined by paragraph "(c)" of 62 Stat. 937 (1948), 28 U. S. C. § 1441, which reads:

> "(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

The Court of Appeals for the Tenth Circuit held that the following allegations in Greenshields' State Court Petition stated a separate and independent claim or cause of action against Great Western Drilling Company and Great Western Producers, Inc., both of whom were Texas corporations (Tr. Vol. I, p. 46):

> "9. * * * [Drilling has ceased and drainage has occurred] all because of the unconscionable, confiscatory and unreasonable 'Gas Purchase Contracts' entered by the 'defendant lessees' and 'Plant Operators' all as will be hereinafter more particularly set out.
>
> * * *
>
> "11. That in late 1950 or early 1951 Warren Petroleum Corporation and Oklahoma Natural Gas Company, corporations, defendants herein entered 'Gas Purchase Contracts' with all the different 'lessee defendants' in the Ringwood Field, *with the exception*

of two who will be hereinafter mentioned.[1] * * * [That the 'Gas Purchase Contracts' were executed and entered by all the] 'lessee defendants' *except by the defendants Great Western Producers, Inc. and Great Western Drilling Company, a corporation, who have since entered the contract, however, with certain modifications as to producing zones committed under the same. That with this one exception*[1] all of the lessees entered exact contracts and thus committed the sale of all their gas in the Ringwood Field. * * *

* * *

"17. That the 'Gas Purchase Contracts' as have been entered by the defendant lessees are unconscionable, confiscatory, unreasonable and are an attempt to alienate valuable property rights from this plaintiff. . . . That the contract was a connivance, collusion, and confederation between the plant operators, Warren Petroleum Corporation and Oklahoma Natural Gas Company and all the 'lessee defendants' who signed the agreement. . . ." (Pet. App. p. v)

The significance of these allegations is explained in the following excerpt from the Opinion:

"Since the acts of the Great Western interests are alleged to have transpired at a different time than those of the other lessee defendants and are further asserted to have consummated in a different result, *the pleader has negatived the participation of Great Western in the principal conspiracy of which he complains.*[2] The contracts signed by Great Western cover a less extensive gas zone than those executed by any of the other defendants. The harm alleged to have been suffered by plaintiff and 'all others similarly situated' by the execution of the gas purchase contracts cannot, by the original state court pleading, be attributable to Great Western. The claim made against Great Western by

1. Emphasis added by Court of Appeals.
2. All emphasis added except where otherwise noted.

plaintiff arises from subsequent and different acts occasioning different results. It is a 'separate and independent claim' within the bounds of Sec. 1441(c) and as such permits removal to federal jurisdiction. The trial court properly granted the petitions of Great Western Drilling Company and Great Western Producers, Inc. for removal from the Oklahoma State Court." (Pet. App. pp. v-vi)

Question to Be Decided.

Is there a conflict between the decision of the Court of Appeals in this case and the holding of this Court in *American Fire & Casualty Company v. Finn*, 341 U. S. 6 (1951), the decisions of other circuits involving the same question or the decisions of the Supreme Court of Oklahoma such as to require this Court to exercise its supervisory powers and take jurisdiction of this case?

Reasons for Denying the Writ.

There is no such conflict between the Opinion of the Court of Appeals, the holding of this Court in the FINN case, the decisions of other circuits involving the same question or the decisions of the Supreme Court of Oklahoma as to require this Court to exercise its supervisory powers and take jurisdiction of this case.

Petitioners assume that the State Court Petition alleges a *continuing conspiracy involving all the defendants* including the Great Western companies and argue that therefore no separate and independent claim or cause of action is alleged. The argument begs the question. If the State Court Petition in fact alleged but a single conspiracy involving all of the defendants obviously—and by definition—there could be no separate and independent claim within the meaning of the removal statute. That, however, was the question the lower courts had to determine.

It is apparent from the quoted allegations from the State Court Petition that Greenshields alleged two separate wrongs. The first involved the execution of Gas Purchase Contracts by all gas producers except the Great Western Companies which covered *all gas* produced from every zone from *all leases* located in a four-township area; the second involved only the contracts of the Great Western companies executed at a much later date and specifically limited to gas produced from a single zone from a single lease. This second wrong was clearly a separate and independent claim or cause of action justifying removal of the entire case under 28 USC § 1441(c).[3] The Great Western companies could not have been parties to the original wrong. They refused to execute the gas contracts until they were limited to cover only the gas produced from the Manning Zone, and then only after the first proceeding before the Oklahoma Corporation Commission had denied them relief. The Court of Appeals properly construed the quoted portion of the petition as a negation[4] of Great Western's participa-

3. Removal can also be justified on the following basis: The allegations of conspiracy in Greenshields' State Court Petition are mere conclusions of law negatived by the *facts* therein alleged. *Sewell v. J. E. Crosbie, Inc.*, 127 F. 2d 599 (CCA 8, 1942), cert. den. 317 U. S. 643, 65 S. Ct. 36, 87 L. Ed. 518 (1942); *Hamilton v. Empire Gas & Fuel Co.*, 297 Fed. 422 (CCA 8, 1924); *First National Bank of Greeley v. United States*, 86 F. 2d 938 (CCA 10, 1936); *National Discount Corp. v. O'Mell*, 194 F. 2d 452 (CCA 6, 1952). Consequently, the gravamen of the State Court Petition lies in contract and the claim asserted against each lessee defendant (and Warren and Oklahoma Natural as gas purchasers from such defendant) is separate and independent because it involved a separate lease contract (*Tillman v. Russo-Asiatic Bank*, 51 F. 2d 1023 (CCA 2, 1931), cert. den. 285 U. S. 539, 52 S. Ct. 312, 76 L. Ed. 932 (1932); Moore, *Commentary on the U. S. Judicial Code* (1949), p. 249) and a separate tract of land (*Pacific Railway Removal Cases*, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319 (1885)).

4. The fact that Great Western did not execute the all-inclusive contracts executed by the other producers—and that the Petition so alleges—negatives Greenshields' general allegation in Paragraph 17 of his Petition that "the contract was a connivance, collusion, and confederation between the plant operators, Warren Petroleum Corporation and Oklahoma Natural Gas Company and all the lessee

tion in the conspiracy based on the execution of the original Gas Purchase Contracts by the other producers covering all gas produced from all zones and from all leases located in the four-township area.

Removal here is entirely in harmony rather than in conflict with *American Fire & Casualty Company v. Finn*, 341 U. S. 6 (1951). There this Court held that but a single wrong was alleged against three defendants. Here, two separate and distinct wrongs are alleged. The first resulted from the alleged execution of the all-inclusive Gas Purchase Contracts by all the producers except the Great Western companies; the second from the execution of the much more limited contracts by the Great Western companies, some two years later. Since diversity of citizenship exists concerning the second wrong, and the jurisdictional amount is present, the entire case was properly removed.

This same distinction removes any conflict between the Court of Appeals decision in our case and cases from other Courts of Appeals cited by Petitioners:

Mayflower Industries, Inc. v. Thor Corporation, 184 F. 2d 583 (CCA 3, 1950) cert. den. 341 U. S. 903, 71 S. Ct. 610, 95 L. Ed. 1342 (1951);

Edwards v. E. I. DuPont de Nemours & Company, 183 F. 2d 165 (CCA 5, 1950);

Bentley v. Halliburton Oil Well Cementing Company, 174 F. 2d 788 (CCA 5, 1949).

In each of these cases but a single wrong was alleged.

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defendants' who signed the agreement" (Pet. App. p. v). Consequently, the Court of Appeals rightly disregarded this general conclusion of law for the specific facts, affirmatively alleged respecting the Great Western companies, demonstrated that they had nothing to do with any such conspiracy. *Sewell v. J. E. Crosbie, Inc.*, 127 F. 2d 599 (CCA 8, 1942), cert. den. 317 U. S. 643, 65 S. Ct. 36, 87 L. Ed. 518 (1942); *Hamilton v. Empire Gas & Fuel Co.*, 297 Fed. 422 (CCA 8, 1924); *First National Bank of Greeley v. United States*, 86 F. 2d 938 (CCA 10, 1936); *National Discount Corp. v. O'Mell*, 194 F. 2d 452 (CCA 6, 1952).

Petitioners also cite authorities in support of the following propositions:

(a) Where a conspiracy is alleged to exist, each of the conspirators participating therein is jointly and severally liable for the acts of all other conspirators done in furtherance of the conspiracy;

(b) In a continuing conspiracy it is not necessary that the acts of all conspirators take place at the same time or that each conspirator personally participate in all of the misconduct;

(c) It is not necessary that each conspirator derive the same measure of benefit from the acts and benefits of the conspiracy or that he benefit at all from them;

(d) A petition alleging joint and several liability in tort against a number of defendants does not state a "separable controversy" under the old Removal Statute.

These are correct abstract propositions of law but they have no relevancy to the propriety of removal here. They assume the issue. The Court of Appeals here held that Greenshields' State Court Petition alleged *two separate wrongs* and that the wrong alleged against the Great Western companies was separate and independent from that involving the other producers. Consequently, the only question was whether the State Court Petition in fact alleged the existence of two separate wrongs, which we submit it did.

Conclusion.

The Opinion of the Court of Appeals holds that Greenshields' State Court Petition alleges a separate and independent claim or cause of action against the Great Western companies, Warren and Oklahoma Natural. The Opinion does not present such a conflict with the holding of this

Court in the *Finn* case, the decisions of other circuits, or the decisions of the Supreme Court of Oklahoma as to require this Court to exercise its supervisory powers. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November, 1957.